United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL 76-2098

To Be Argued By:

L. KEVIN SHERIDAN

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

PEDRO ARROYO and CHRISTOPHER McCORMACK,

Plaintiffs-Appellants,

-against-

PETER M. SCHAEFER, Former Deputy Warden in Command, Manhattan House of Detention; RALPH SUMOWITZ and PATRICK MAGNER, Assistant Deputy Wardens, KENNETH FERGUSON, CONSTANTINE MELLON, and PAUL FELTMAN, Captains; JOSEPH OCHMAN and ROY SCHUH, Correction Officers; and DR. KAPP, Institutional Physician,

Defendants-Appellees.

APPELLEES' BRIEF

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TABLE OF CONTENTS

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Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (KNAPP,J.), entered July 23, 1976, dismissing plaintiffs' amended complaint seeking damages based upon alleged violation of 42 U.S.C. §1983. The complaint was ordered dismissed at the close of the plaintiffs' case, at a trial before a jury, based upon the district court's conclusion that plaintiffs had failed to show

a violation of §1983 by any of the defendants sufficient to hold such individuals liable for damages to plaintiffs for their alleged injuries. *

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*Plaintiffs prayer for injunctive and declaratory relief was withdrawn prior to trial.

STATEMENT OF THE CASE

(1)

On September 12, 1972, at the Manhattan House of Detention for Men an inmate, Lloyd Hughes, refused to return to his cell, to which he had been ordered to return, and had to be forcibly subdued. In attempting to subdue Hughes, who on earlier occasions had resisted returning to his cell when ordered to (13)*, defendant Correction Officer Ochman sprayed tear gas dust from a cannister at him (17; Ex. 1). According to plaintiff McCormack, the dust was sprayed in bursts lasting "anywhere from three to five seconds ... all told about 15 seconds' worth"(17).

McCormack described the scene following the discharge of the dust as follows (17):

> "... we were choking and everyone was trying to get towels, and to, you know, trying to avoid all this discomfort and at the same time there was a lot of confusion, Everybody is panicking. We were asking to be let out ourselves. The officers and everything, they were going about dragging Mr. Hughes out."

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*Numbers in parentheses refer to the pages of the trial transcript.

McCormack testified that while the dust wasn't sprayed directly into his cell, it was in the air and he "was breathing it " (18). He started to cry and to choke, and some minutes later suffered nosebleeds and vomited (18 - 19).

Plaintiff Arroyo testified that the dust was sprayed directly into his cell, hitting him (112), and that it burned his eyes and skin (114).

Both plaintiffs testified that, following the discharge of the dust and the subduing of Hughes, they asked to leave the area but were not allowed to do so (19, 115). Both also testified that they requested medical attention but none was provided that day. These requests were made to an unidentified nurse or nurses (20, 57, 116). Also unidentified are the correction officers to whom plaintiffs allegedly addressed their requests for permission to leave the area.

According to McCormack, the nurses who were in the area later that day were there simply to administer earlier prescribed medication (55). He received no medication that day (55). The nurses were not wearing gas masks, but when the shift was changed the correction officers coming on duty were wearing gas masks (56).

McCormack conceded on cross-examination that following the incident large, pedestal fans "might have been put" in that area of the jail (56-57).

He also testified that there were "close to 60 people" in that section of the institution at the time, and that all were suffering from the effects of the gas, were "angry about being subjected to it," and requested medical assistance (57-58).

(2)

Dr. Peter Schnall, a physician employed at Montefiore Hospital in the Bronx, also testified for plaintiffs, as an expert on the effects of various types of tear gas (60, 62).

Dr. Schnall completed medical school in 1969, his internship in 1970, and a residency in internal medicine in 1973. He is certified by the State of New York as an internist and has completed the training required to be eligible for board certification as a specialist in internal medicine (60-61).

For the eleven years prior to the trial he had been a member of the Medical Committee for Human Rights (62), and at demonstrations both in the South and elsewhere he had treated about two dozen persons who had been exposed to tear gas (62-63). In addition, in preparation for this

trial, and on an earlier occasion, in 1969, he had reviewed the literature on the diagnosis and treatment of individuals suffering from the effects of tear gas (63, 92). He had also studied the literature on the particular type of tear gas cannister used in this case, which he testified was designed to produce a ten second emission of "CN series gas" (69-70), which in fact is not simply a gas, but rather is a powder or dust, like talcum powder, which is pro - pelled from the pressurized cannister by means of a gaseous propelling agent (96).

Dr. Schnall testified that CN was originally developed for use outdoors, but that "recently" a tear gas gun had been developed for use indoors, "which is intended to be used on small crowds"(70). CN is one of the "milder forms" of tear gas (89,91), "is the one that is most widely used by law enforcement agencies" (91), and is used in the New York State prisons (91).

The doctor testified as to the various adverse reactions varying concentrations of CN tear gas could produce (e.g., 66-68, 76-79), including burning of the eyes and chest and of the skin (80), but he also testified that if there was no burning sensation on the skin (which McCormack had not complained of, although he complained of tearing and choking, as well as nosebleeds and

vomiting), he would presume the concentration was "quite low" (103). He further testified that such a low concentration of CN gas would not induce vomiting (which McCormack had claimed) and that in his experience he had never observed anyone suffer nosebleeds (also claimed by McCormack) as a result of exposure to CN gas (104,108).

(3)

At the close of the plaintiffs' case, in response to the defendants' motion to dismiss, plaintiffs' counsel explained to the Court her theories upon which she would have had the case submitted to the jury against the various defendants.

First, as to the defendant Commissioner Malcolm, counsel argued merely that the Commissioner should have promulgated more regulations as to when tear gas should be used (169). This argument was rejected by the district court, and plaintiffs have not appealed from the dismissal as to this defendant (see Notice of Appeal to this Court).

Second, as to the balance of the defendants, except the defendants Deputy Warden Schefer and Dr. Karp, a jail doctor who had been on the scene and treated Hughes after he was subdued, plaintiffs' main theory was that these

defendants could be held liable because they were present yet did nothing "to assist the plaintiffs to avoid suffering the effects of the gas "(172; see also, 189-191). In addition, counsel also urged in the court below, although this is not urged on this appeal, that at least certain of these defendants could be held liable under §1983 on the theory that use of tear gas in this situation was "inappropriate" (173-174).

As to the first theory, failure to act on behalf of the inmates, the district court noted initially with respect to the Correction Officer defendants that these defendants had no authority to release the inmates from this area (186-187). Similarly, the Court held that the defendant Captains (Ferguson, Mellon and Feltman) had not been shown to have any particular duty to plaintiffs (188), or to have "deliberately deprived" plaintiffs of their constitutional rights (189).

As to the defendant Assistant Deputy Wardens, defendants Sumowitz and Magner, both of whom were at the scene when Hughes was subdued, after noting the responsibility of these officials, the Court noted that (204-205):

> "... there is no evidence against any of them [apparently referring to all defendants], that any medical help was withdrawn. The only evidence that medical help was asked for, was it was asked for from a nurse. There was no suggestion that the nurse told anybody medical help was requested and there is no suggestion anybody here ever heard that medical help was requested, so that is out of the case."

As to the defendant Deputy Warden Schaefer, the district court also noted that Schaefer was not at the scene (196), and there was "no indication that Mr. Schaefer knew that gas was going to be used at all let alone that he knew it was going to be used in a situation where it wasn't warranted" (201).

As to Dr. Karp, who was at the scene, and whom plaintiffs suggest should have appreciated their need for immediate medical attention (Brief, p. 8, Footnote; p. 15, Footnote three), the district court pointed out that Dr. Karp was at the scene for the specific purpose of assisting Hughes once Hughes was subdued (and went with Hughes to the receiving room clinic) (178-179), and there was "no evidence to show that Dr. Karp knew there was anything wrong with anybody except Mr. Hughes" (179; see also, 180-181).

Summarizing his reasons for dismissal, the district court stated (209-211):

> ". . . with respect to the defendant Commissioner Benjamin Malcolm and Warden Peter Schaefer, I dismiss on the ground that the requirements of Johnson v. Glick [481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)] have not been complied with.
>
> As to the other defendant Dr. Karp, I dismiss on the ground that there is no evidence. . .that he knew that any plaintiff was in need of medical attention, and therefore, no evidence that he failed to give any plaintiff any medical attention, nor is there any evidence that he had duties beyond giving medical attention to such persons whose needs might come to his attention.

With respect to all other defendants with the exception of Joseph Ochmann [whose action in discharging the tear gas duct is not challenged on appeal], there is no evidence, assuming that among the groups there may have been one or more---assuming without deciding that among the groups there may have been one or more who either did something adverse to the plaintiffs or who had an obligation to do something favorable to the plaintiffs, there is no evidence to indicate which if any of the several defendants either did such unlawful act or failed to do such necessary act.

I reject plaintiffs' theory that individual liability can be fastened on the groups absent some evidence of conspiracy between, them, which is neither alleged nor proved in this case."

ARGUMENT

PLAINTIFFS FAILED TO MAKE OUT A PRIMA FACIE CASE AGAINST ANY OF THE DEFENDANTS.

In their brief filed on this appeal plaintiffs cite, inter alia, decisions holding that police or jail officials may be held liable under §1983 where they had knowledge of a detainee or inmate's need for medical assistance and none was provided. See Shannon v. Lester, 519 F. 2d 76 (6th Cir., 1975); Fritzke v. Shappell, 468 F. 2d 1072 (6th Cir., 1972). However, whatever the correctness of those decisions, they are not here in point, and plaintiffs' counsel is well aware of this. There was absolutely no evidence here that any of the defendants was made aware that the plaintiffs had requested or were in need of medical assistance. Nor was there even evidence that any of the defendants was aware that plaintiffs had been subjected to such a concentration of the CN gas that medical attention might be required. *

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*The testimony that the guards who came on the floor on the next shift wore gas masks would constitute evidence of some notice of an unhealthful condition, but there is no evidence linking any of the defendants to the decision to so equip these officers.

In an attempt to make up for this gap in their proof, plaintiffs are driven to arguing that (1) the officers' training and the manufacturer's literature should have put them on notice of the "plaintiffs predicament" and (2) the fact that the plaintiffs and other inmates allegedly "called out repeatedly to be released from their cells and the gas-laden tier" should have also furnished such notice (Brief, p. 18).

On neither of these theories, we submit, were plaintiffs entitled to have this case submitted to the jury as against any of the defendants. First, as to defendant Schaefer, as plaintiffs acknowledge (Brief , p. 19), he was not even present, and there was no evidence that he was aware at the time that tear gas had been used in subduing Hughes, or that he became aware of its use in time to make any difference to "plaintiffs' predicament."

Second, as to all of the other defendants, who were present at the scene for some period of time, we would note that this was an emergency situation, where the officers had to be concerned with the possibility of this one inmate disturbance turning into a larger, more dangerous disturbance, and thus, even assuming liability for damages under §1983 may be imposed, under some circumstances on a negligence theory such as plaintiffs propose, this is surely not such a case.

At most, plaintiffs' proof demonstrates a failure to act where no clear health hazard to plaintiffs was shown to be known to these defendants and where the defendants were properly concerned with preventing a possible inmate disturbance. There is no evidence of "evil intent, or recklessness, or ... deliberate indifference" (Williams v. Vincent, 508, F. 2d 541, 546 [2d Cir., 1974]), on the part of any of these defendants with respect to plaintiffs' welfare, and plaintiffs cite to no case upholding imposition of personal liability for damages under §1983 under such circumstances.

Essentially, plaintiffs' claim here is that the defendants negligently failed to appreciate the degree to which Officer Ochman's use of CN gas in subduing Hughes posed a health hazard to plaintiffs. Consistently, this Court has held that such a claim does not state a cause of action for violation of §1983, at least not where the complained of failure is not barbarous or such as to shock the conscience. See Williams v. Vincent, supra, 508 F. 2d at 546; Corby v. Conboy, 457 F. 2d 251, 254 (2d Cir., 1972); United States ex rel. Hyde v. McGinnis, 429 F. 2d 864 (2d Cir., 1970); Church v. Hegestrom, 416 F. 2d 449, 450-451 (2d Cir., 1969). The conduct of defendants shown here cannot, we submit, fairly be characterized as barbarous or such as to shock the conscience. Accordingly, it should be held that Judge Knapp was correct in ordering dismissal of the complaint as to all defendants.

CONCLUSION

The judgment appealed from should be affirmed.

November 15, 1976

Respectfully submitted,

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L. KEVIN SHERIDAN,

of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 15 day of NOV 1976, he served the annexed APPELLES BRIEF upon Wm. E. HELLERSTEIN & M. SMITH Esq., the attorney for the OPPOSING PTTY herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 15 Park Row in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
15 day of NOV. 1976

Notary Public

James Burns

76

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